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Supreme Court of the United States

October Term, 1954
No. 479

BERNARD B. KANISCHER,
Petitioner,

vs

IRWIN OPERATING CO.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Supreme Court of the United States

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vs

IRWIN OPERATING CO.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Bernard B. Kanischer prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit rendered on August 25, 1954.

Jurisdiction

Jurisdiction to review this case is based on 28 U. S. C., §1254 (1). The opinion below was filed August 25, 1954, rehearing denied on the 14th day of September, 1954.

Summary Statement

On the 25th day of August, 1951, the petitioner was ordered over the side of the motor boat on which he was working, by its captain, the person in charge thereof, to

take the bow line so as to control said boat. Your petitioner obeyed the orders of his superior, Joseph Kaplan, got over the side of the boat safely and was holding the bow line in his hands when he was caused to be injured by reason of Kaplan suddenly starting the motor boat, without affording your petitioner a reasonable opportunity to avoid the accident or giving him any notice that Kaplan was about to start the said motor boat. When the motor boat started it struck petitioner and caused him to lose his balance and be submerged underneath the motor boat. Petitioner's both legs came in contact with the propeller of said motor boat resulting in practically total loss of the use of his left leg and almost as severe and permanent injuries to his right leg.

Kanischer sued his employer claiming his right to maintain said action predicated on the provisions of the Jones Act.

The trial court dismissed the action on the ground that the Federal Court lacked jurisdiction.

The court below affirmed the decision of the trial court and further stated that various prerequisites, such as ownership of the vessel involved, etc., were necessary for seamen to maintain an action under the Jones Act.

The Decision Below

The opinion was written after the death of Judge Strum, who sat during the oral argument in this case and concurred in this decision before his death.

The District Court dismissed the complaint on the 1st day of February, 1954.

The District Court dismissed the action at the close of the plaintiff's case on the basis that the court was without jurisdiction, holding that the respondent herein was not the owner of the vessel and that there was no employer-

employee relationship existing between the petitioner and respondent, and that there was no diversity of citizenship.

The Court erred in its decision in view of the fact that this action is predicated upon the provisions of the Jones Act, 46 U. S. C., §688.

The Court below held that the petitioner was employed by the respondent as a cabana boy, whose regular duties were those of a landsman and not of a seaman, therefore he was not entitled to the benefits of the Jones Act, and affirmed the decision of the trial Court.

The fact that petitioner was doing the work of a seaman at the time he was injured was not given due consideration.

Statutes Involved

Section 33 of the Merchant Marine Act of 1920; 41 Stat. 988, §250, 46 U. S. C., §688; Longshoreman's & Harbor Worker's Compensation Act, 33 U. S. C., §901, *et seq.*, 44 Stat. 1424.

Questions Presented

1. In the event of the death of a Court of Appeals Judge, who sat during the oral argument of a case and expressed concurrence in a decision, may the surviving two judges write an opinion and render a decision after his death, or must the matter be set again for argument before three Court of Appeals Judges?

2. Do the provisions of the Jones Act, 46 U. S. C. §688, apply to unorganized personnel and temporary company, suffering maritime tort in the course of doing work traditionally performed by seamen?

3. Is ownership or ownership *pro hac vice* of an employer a prerequisite for liability under the Jones Act for a martime tort suffered by its employee?

Reasons for Allowance of the Writ

The opinion was written and the decision rendered after the death of Judge Strum, who was one of the three judges of the United States Court of Appeals for the Fifth Circuit, the Court below, who sat during the oral argument in this case.

Remedial legislation granted by Congress, 46 U. S. C. §688, commonly known as the Jones Act, has been curtailed and limited in a manner which appears to be contrary to the intent of Congress.

The requirements enunciated by the Court below as prerequisites for a seaman invoking the Jones Act constitutes new principles of law which seem to be at variance with the decisions of this Court.

Title to a vessel; the profitable or non-profitable nature of the ship's venture; the size of the vessel; the composition of the ship's personnel; the regular or occasional duties of the seamen thereon; the direct or remote control by the employer, have never been considered factors in the right to maintain an action under the Jones Act.

The law seems well settled that the basis for maintaining an action pursuant to the provisions of the Jones Act is the factual showing of an employer-employee relationship between the parties, the employee suffering a maritime tort during the course of his employment while performing the usual duties of a seaman, and not the title to the vessel nor the terms of contracts of employment of men thereon.

POINT I

The authorities relied on by the Court below are not persuasive but seem rather to support a directly contrary holding.

The Court below in sustaining the trial Court stated as follows:

> "On those findings he held that the action could not be maintained under the Jones Act and would have to be dismissed, as it had not been made to appear that the defendant was either the owner or the owner pro hac vice of the boat at the time of the accident, citing Fink v. Shepard Steamship Co., 337 U. S. 810; Cosmopolitan Shipping Co. v. McAllister, 337 U. S. 783; Gerradin v. United Fruit Co., 60 F. 2d 927" (p. 206).

It seems the holding given these decision by the Court below is contrary to, and in conflict with, that given by this Court.

The United States Supreme Court in the case of *Cosmopolitan Shipping Co.* v. *McAllister,* 337 U. S. 783, 69 S. Ct. 1317 (1949), held that under the Jones Act only one person, firm or corporation can be sued as an employer. The exact language appearing at page 791 being as follows:

> "The seamen's substantive rights are the same whoever is the employer".

The Court further held on page 790:

> "* * * 'Employment' should be construed so as to give protection to seamen for torts committed against them by those standing in the approximate relation of employer, * * *"

In the case of *Fink* v. *Shepard S. S. Co.*, 337 U. S. 810, 69 S. Ct. 1330, this Court stated at page 812:

> "The question here is identical with that in McAllister" * * *.

This Court further stated at page 813:

> "It establishes that respondent was neither the employer of officers on vessels such as the Davidson nor a party to such a relation with them that it could be held vicariously liable for their torts."

At page 815 this Court spoke of an owner or owner *pro hac vice* of a vessel as being liable for wages, but pointed out that such liability stemmed from the contract of employment.

It would seem that the title to the vessel is immaterial. This Court summarized liability under the Jones Act as grounded on the relationship of employer and employee.

In the case of *Gerradin* v. *United Fruit Co.*, 60 F. (2d) 927, Judge Augustus N. Hand, in the opinion writing for the unanimous Court, traced the remedial legislation pertaining to seamen.

At page 929 it was pointed out that the seamen acts are concerned with American owned ships, but it is quite clear that the right of action is against the employer of the seaman, irrespective of the flag of the vessel.

The Court stated at page 929:

> "There can be no doubt about the power of Congress to impose liability upon its own citizens for acts done on the high seas or at other places outside its territorial jurisdiction. American Banana Co. v. United Fruit Co., 213 U. S. at page 356, 29 S. Ct. 511, 53 L. Ed. 826, 16 Ann. Cas. 1047. Section 33 of the Merchant Marine Act (46 USCA §688) has done

this in the case of American citizens who own ships on which seamen are injured through their negligence, and it seems but a slight disregard of the symbol of foreign registry to apply an ordinary rule of torts to a shipowner who bears such an illusory shield. The question is not one of power, but of the meaning and scope of Rev. St. § 4612."

The Jones Act specifically speaks of an action by an employee against an employer without reference to title to the vessel. So, also in the case of *Gerradin* v. *United Fruit Co., supra,* the Court did not permit an "illusory shield" to exonerate an employer from the consequences of his wrongful act.

The Order (Tr. pp. 19, 20 and 24) provided that Irwin Operating Co. was the employer.

Under the authority of the *Cosmopolitan* case, *supra,* Irwin Operating Co., was the proper party and the only party against whom the Jones Act cause of action could lie by its employee, Kanischer, for maritime tort.

POINT II

The Court below refused to consider the statutory definition or the definition laid down by this Court but adopted its own new and different interpretation of the meaning of the word "seaman".

The Jones Act has always been liberally construed to give protection to workers injured on ships, leaving disputed factual issues to the jury's determination.

Whether or not Kanischer was given an order emanating from his employer would seem to be a question of fact to be determined by a jury and not by an Appellate Court.

Kanischer did all the work commonly performed by a seaman. A person employed to work aboard a vessel (Tr.

pp. 133, 139); who paints the vessel (Tr. pp. 131, 172-173, 185); who handles gear (Tr. p. 137); or lines and anchor (Tr. pp. 73, 74, 87, 92, 116, 134-137, 139-140, 142, 179); cleans the vessel (Tr. pp. 134, 137); scrubs the decks (Tr. pp. 142, 143); handles equipment (Tr. pp. 140-142); cuts bait for the benefit of passengers (Tr. pp. 73, 74, 135, 87-141), and puts it in place and aids in its navigation is a seaman. *McKie v. Diamond Marine Co.*, 204 F. (2d) 132 (5th Cir.).

The maritime expert witness, Frank Paul, testified that in the Miami area, with which he was most familiar, a person who was employed and ordered to do these things was a seaman (Tr. pp. 191, 194-195).

It was error for the Court to rule as a matter of law that Kanischer was not a seaman.

The question as to whether or not Kanischer was a seaman was a factual matter to be determined by the jury. *McKie* v. *Diamond Marine Co., supra.*

In the case of *Carumbo* v. *Cape Cod S. S. Co.*, 123 F. (2d) 991 (1st Cir. 1931), the Court reviewed the theories which give to a person the status of a seaman under the Jones Act.

> "The cases hold that a person who works aboard a ship cannot be a 'seaman' if the ship is not in navigation. (Citations omitted). To be a 'seaman', however, it is not required that the employee's work be in aid of navigation or that he be on board primarily to aid in navigation. (Citations omitted). Moreover, the Jones Act has always been liberally construed. (Citations omitted). 'Verbal niceties were bent to the overmastering purpose of the act to give protection to workers injured upon ships.' *Warner* v. *Goltra, supra,* 293 U. S. at page 156. It was said in that case, at page 160 of 293 U. S., (master of a tug boat) and in *Uravic* v. *F. Jarka Co.,*

(1931) 282 U. S. 234, 239 (an American citizen employed as a stevedore unloading a vessel flying the German flag in New York harbor) that the word 'seaman' in the Jones Act is to be given broader scope that 'seaman' as defined in 46 U. S. C. A. 713:

'In the construction of this chapter, every person having the command of any vessel belonging to any citizen of the U. S. shall be deemed to be the 'master' thereof; and every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a 'seaman'; and the term 'vessel' shall be understood to comprehend every description of vessel navigating on any sea or channel, lake or river * * *.'

"That definition itself 'is directed to extension not to restriction'. (citation omitted) The process of liberal construction of the Jones Act cannot now be ignored because Congress has seen fit to pass the Longshoremen's Act. As a result of the cases, we feel constrained to hold that one who does any sort of work aboard a ship in navigation is a 'seaman' within the meaning of the Jones Act" (pp. 994, 995).

The Court below seems to have adopted a contrary view.

POINT III

Uniformity of decision is destroyed by distinctions made on the basis of the size of the vessel, nature of its voyage and the employment terms with its seamen.

The fact that the vessel involved was a motor boat does not make it any less subject to the Jones Act than if it were a merchant vessel.

The Court in the case of *Salaky* v. *Atlas Tank Processing Corp.* (unofficially reported), 1954 A. M. C. 80, held that even a row boat came within the provisions of Admiralty jurisdiction, stating as follows:

> "Libellant may recover for damages to the row boats involved in this suit. Section 740 of Title 46, U. S. Code, which was enacted subsequent to Perry v. Haines, 191 U. S. 17, extends the admiralty jurisdiction 'to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, * * *' and as I read the statute it includes row boats and all articles of personal property" (pp. 80, 81).

Insofar as no distinction is made in Admiralty by reason of the size and type of vessel, there does not seem to be any justification to draw a distinction in a Jones Act case.

An action under the provisions of the Jones Act, may be maintained against an employer who is not the owner of the vessel. *International Stevedoring Co. v. Haverty,* 272 U. S. 50; *Beadle* v. *Spencer,* 298 U. S. 124; *Jamison* v. *Encarnacion,* 281 U. S. 635.

With the passage of the Longshoremen's and Harbor Worker's Compensation Act in 1927, 33 U. S. C. A. 901, *et seq.,* material changes were made as to the rights of longshoremen but not as to the rights of seamen under the Jones Act against an employer, who was not the owner of the ship in question.

CONCLUSION

For the reasons set forth above, we respectfully submit that this Court should issue its Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit in this cause.

Respectfully submitted,

JACOB RASSNER,
Attorney for Petitioner.

Opinion and Order of Dismissal for Lack of Jurisdiction

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

No. 3926-M-Civil

BERNARD B. KANISCHER,

Plaintiff,

vs.

JOSEPH KAPLAN, CADILLAC HOLDING CORP., a Florida corporation, IRWIN OPERATING CO., a Florida corporation jointly and severally,

Defendants.

Filed
Miami Fla
Feb 1 1954
JULIAN A. BLAKE, Clerk

This cause came on for trial before the undersigned Judge and a Jury. At the conclusion of plaintiff's case, the defendant Irwin Operating Co. moved the Court to direct a verdict in favor of the defendant, or, in the alternative, to dismiss the cause for lack of jurisdiction.

This is an action under the Jones Act, 46 U. S. C. A. Sections 688 et seq., brought by an employee against his employer, contending that he was injured while on a fishing trip aboard the boat Jo Ann, due to the negligence of one Joseph Kaplan, who was the sole owner and in possession

and control of the boat at the time of the accident. There is no evidence to show that there was any connection between the defendant Irwin Operating Co. and the operation of the boat Jo Ann or that Kaplan was operating the same as the agent, servant or employee of this defendant or otherwise. It follows, therefore, that this action cannot be maintained under the Jones Act, as it has not been made to appear that the defendant was either the owner or the owner pro hac vice of the boat at the time of the accident. *Fink* v. *Shepard Steamship Company*, 69 S. Ct. 1330, 33 U. S. 810, 93 L. Ed. 1709; *Cosmopolitan Shipping Company* v. *McAllister*, 69 S. Ct. 1317, 337 U. S. 783, 93 L. Ed. 1692; *Gerradin* v. *United Fruit Company*, 60 Fed. (2d) 927. It is unnecessary to rule on the other grounds assigned in support of the motion.

Accordingly, it is ORDERED AND ADJUDGED that this action be and the same is hereby dismissed as to the defendant Irwin Operating Co., for lack of jurisdiction, and said defendant go hence without day, together with its costs to be taxed by this Court.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida, on this the 1st day of February, A. D., 1954.

C. C. WYCHE,
United States District Judge,
Sitting by Designation.

Opinion

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 14996

BERNARD B. KANISCHER,
Appellant,

versus

IRWIN OPERATING CO.,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA.

(August 25, 1954.)

Before HOLMES and STRUM, Circuit Judges, and THOMAS, District Judge.

THOMAS, District Judge: Naming as defendant his employer, a corporation operating a resort hotel at Miami Beach, and one Kaplan, owner and operator of the speed boat "Jo Ann", appellant filed suit under the Jones Act, 46 U. S. C. A. § 688, for serious injuries to both legs, resulting from contact with the propeller of the boat on August 25, 1951.

In sequence, motions to dismiss for want of jurisdiction under the Act and for summary judgment on the same ground were filed by the employer-defendant, appellee here. After each motion had been denied by the district judge, the case came on for a pre-trial hearing, as a result of which it was stipulated, among other things, that the relationship of employer and employee did not exist between Kaplan and the plaintiff. On consideration of this stipulation, the trial judge, with plaintiff's consent, transferred the suit against Kaplan to the admiralty docket, and allowed the case against the defendant-employer to proceed to trial before a jury. When the plaintiff had rested his case, defendant moved the court to direct a verdict for the defendant or, in the alternative, to dismiss the case for lack of jurisdiction.

The trial judge found that Kaplan was the sole owner and was in possession and control of the boat at the time of the accident; and that there was no evidence to show that there was any connection between the defendant-employer and the operation of the boat "Jo Ann", or that Kaplan was operating the boat as the agent, servant or employee of the defendant. On those findings he held that the action could not be maintained under the Jones Act and would have to be dismissed, as it had not been made to appear that the defendant was either the owner or the owner *pro hac vice* of the boat at the time of the accident, citing *Fink* v. *Shepard Steamship Co.*, 337 U .S. 810; *Cosmopolitan Shipping Co.* v. *McAllister*, 337 U. S. 783; *Gerradin* v. *United Fruit Co.*, 60 F. 2d 927.

We agree with the result, but we do not think this reasoning is wholly dispositive of the case. Other phases of this litigation, we believe, are of equal importance and should be discussed. Pertinent portions of the record disclose the following facts:

Opinion

Appellant had been employed by appellee for several years as a cabana boy, whose duties were to look after the bathhouses on the beach and to wait upon the guests who occupied these cabanas during the day. For the winter season plaintiff-appellant testified his tips were sufficiently remunerative, and he received no additional compensation from the hotel. During the summer months, he received a monthly salary of $50, plus tips. His hours were approximately from 8:00 a. m. to 6:00 p. m. When he was not busy looking after the cabanas and waiting on guests, he could, after obtaining permission of a superior, fish during working hours from the jetties, or swim, or otherwise amuse himself. He liked to fish, and sometimes took the small guests of the hotel fishing from the jetties.

On two occasions prior to the day on which he received disabling injuries from the propeller of the "Jo Ann", he had been fishing with Kaplan on Kaplan's pleasure boats. Appellant maintains that on those occasions and on the day of the injury his status was that of a seaman, engaged in marine employment, acting under the direction of his employer to do whatever Mr. Kaplan wanted. The "Jo Ann" was an eighteen-foot pleasure craft with an inboard motor, and had a propeller designed for high speed. She was owned and operated by Kaplan. The hotel corporation had no interest of any sort in her or in any other boat. Kaplan, however, was financially interested in the hotel, though he had nothing to do with its management. On the day of the accident, he took fishing with him two young teen-age relatives, the appellant, and appellant's friend, a lifeguard. They were out about an hour and a half, during which time appellant testified he handled the anchor, cut bait, baited hooks, cleaned fish, straightened out fishing tackle, did some fishing himself, and cleaned up the boat. Upon returning to the beach, appellant got out of the boat—he claims at the direction of Kaplan—to hold it and prevent scraping on the

bottom. An unexpected maneuver of the boat caught him off guard, and sucked him into the revolving propeller.

It is unnecessary to detail appellant's version of the accident. Our concern is to determine whether or not under the pleadings, the pre-trial stipulation, and the testimony offered by the plaintiff in the court below, the court had jurisdiction of the cause.

Under the Jones Act, a seaman may bring an action at law against his employer for personal injuries sustained in the course of his employment. In an action under the Jones Act, the burden of proof is on the plaintiff to establish negligence on the part of the defendant. The Jones Act applies only to masters and members of the crew. We must therefore analyze the facts in this case to determine whether or not appellant as plaintiff places himself within the scope of the Jones Act.

(1) Was he a seaman? *McKie* v. *Diamond Marine Co.*, 204 F. 2d 132, 135.

(2) Did he sustain personal injuries in the course of his employment as a seaman?

(3) Was he the master or a member of the crew of the vessel involved? *McKie* v. *Diamond Marine Co., supra; Maryland Casualty Co. et al.* v. *Lawson, Deputy Commissioner, et al.*, 94 F. 2d 190, 192.

(4) Was the defendant the owner *pro hac vice* of the "Jo Ann" at the time of the accident?

(5) Has plaintiff shown any negligence on the part of his employer?

The appellant was employed by the defendant as a cabana boy. The duties of a cabana boy are those of a landsman, and not of a seaman. The appellant, as do many others, enjoyed fishing. He had gone fishing previously on

the "Jo Ann". He went fishing on the "Jo Ann" on the day of the accident. Irwin Operating Co. did not employ him as a seaman, and his going fishing on the "Jo Ann" on the date of the accident was not even incidental to his employment. But even assuming that the evidence discloses, which we do not agree, that he was instructed by his superior to go fishing with Mr. Kaplan on the day in question, then the fishing trip would certainly be only incidental to his employment by the hotel. Even had appellant been an experienced seaman, and even had he held seaman's papers, we would still have to refer back to proposition (2): Was he injured in the course of his employment as a seaman? Employment contemplates the relationship of employer and employee. He was not employed by the Irwin Operating Co. as a seaman but as a landsman, and his going on the "Jo Ann" on the day in question did not make him a seaman *pursuant to his contract of employment with the defendant.*

Assuming, however, that the appellant has met the burden of proof by establishing that he was a seaman and that he was injured in the course of his employment as a seaman, then we are confronted with proposition (3): Does he come under the Jones Act as master or member of the crew? The evidence definitely shows that he was not master. If the "Jo Ann" had a master, it was Kaplan. Then, was appellant a member of the crew? Our thoughts are directed along the line marked by this court in *Lawson, Deputy Commissioner, et al.* v. *Maryland Casualty Co.*, 94 F. 2d 193, as follows: "In a loose sense he was of the crew of the skiff, but we do not think a rowboat less than sixteen feet long, capable of carrying three men, and propelled by one oar at its stern, is a vessel having a crew within the meaning of this law [Longshoremen's and Harbor Workers' Compensation Act], in spite of the very broad definition of a vessel

found in 1 U. S. C. A. § 3. Such a boat usually has no organized personnel, no permanent company."

The "Jo Ann" was a speed boat eighteen feet long, propelled by an inboard motor. She was privately owned by Kaplan, and the record indicates that she was used exclusively as a pleasure boat by Kaplan and not for commercial purposes. But we are not concerned with her usual use. We are concerned with her use on the day in question. Kaplan wanted to go pleasure fishing. He wanted to take two young friends pleasure fishing. He invited appellant to go with him, and you may call it either as a guest or as one to assist with the boat. It makes no difference. On the day in question, appellant was not a member of the organized personnel or crew of the ship. We do not think that Congress ever intended the Jones Act to cover two or three friends duck hunting in a skiff or fishing from a privately-owned, non-commercial, eighteen-foot speed boat, even though on navigable waters.

Kaplan during the entire fishing trip and at the time of the accident was on a pleasure fishing trip solely initiated by him. Kaplan was the owner of the boat. The trip was never intended to be of any benefit to the defendant. The trip was not in furtherance of the business of the defendant. During the entire trip there was no agency relationship between Kaplan and the defendant. The defendant during the trip and at the time of the accident was not the owner *pro hac vice* of the "Jo Ann."

But assuming that the plaintiff-appellant has met the burden of proof on all of the first four propositions, we are then confronted with the question of negligence. The law suit is against Irwin Operating Co. Assuming that appellant's superior, acting for Irwin Operating Co., and acting within the line and scope of his employment, did direct appellant to go fishing with Kaplan on the occasion in question, is that negligence? We think not. There is no evi-

dence in the record that the defendant knew or should have known at the time that Kaplan was an incompetent operator, if indeed he was. If there be negligence, whose negligence was the proximate cause of the accident? Appellant says it was Kaplan's. In order for appellant to recover against the Irwin Operating Co. for Kaplan's negligence, appellant would further have the burden of proving that Kaplan at the time he committed the alleged negligent act was the servant, agent or employee of Irwin Operating Co., and as such was acting within the line and scope of his authority. *Reece* v. *Ebersbach, et al.*, 9 So. 2d 805, 152 Fla. 763, certiorari denied 318 U. S. 784; *Tobler* v. *Pioneer Mining & Mfg. Co.*, 52 So. 86, 166 Ala. 482. The record does not support such a finding.

While we realize that this case was disposed of in the lower court on the jurisdictional feature, we have discussed the issues of line and scope, and negligence, as both are involved in the application of the Jones Act, and we think that under the facts in this case these two features are pertinent and inescapable.

It is our opinion that at the time of the accident (1) appellant was not a seaman; (2) he did not sustain his injuries in the course of his employment as a seaman; (3) he was not the master or a member of the crew of the "Jo Ann" at the time of the accident; (4) the defendant was not the owner *pro hac vice* of the "Jo Ann" at the time of the accident; and (5) appellant has shown no negligence on the part of Irwin Operating Co.

For these reasons appellant has failed in his effort to bring this case within the terms of the Jones Act and the ruling of the lower court is affirmed. No costs to be taxed.

AFFIRMED.

Judge Strum sat during the oral argument of this case and concurred in this decision, but died before the opinion was written.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Filed
Miami Fla
Oct 4 1954
JULIAN A. BLAKE
Clerk

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable the Judge of the United States District Court for the Southern District of Florida.—GREETING:

WHEREAS, lately in the United States District Court for the Southern District of Florida, before you, in a cause between Bernard B. Kanischer, plaintiff, and Joseph Kaplan, Cadillac Holding Corp., Irwin Operating Co., jointly and severally, defendants, No. 3926-M-Civil, wherein the judgment of the District Court entered in said cause on the 1st day of February, A. D., 1954, was in favor of defendants, Irwin Operating Co., and against plaintiff, Bernard B. Kanischer, as by the inspection of the transcript of record of the said District Court, which was brought into the United States Court of Appeals for the Fifth Circuit, by virtue of an appeal sued out by Bernard B. Kanischer,

agreeably to the act of Congress in such case made and provided, fully and at large appears.

AND WHEREAS, in the present term of October, in the year of our Lord one thousand nine hundred and fifty-three, the said cause came on to be heard before the said United States Court of Appeals, on the said transcript of record, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed: No costs to be taxed.

August 25, 1954.

"Judge Strum sat during the oral argument of this case and concurred in this decision, but died before the opinion was written."

YOU, THEREFORE, ARE HEREBY COMMANDED that such execution and further proceedings be had in said cause as according to right and justice, and the laws of the United States ought to be had, the said appeal . . . notwithstanding.

WITNESS the Honorable EARL WARREN Chief Justice of the United States, the 29th day of September, in the year of our Lord one thousand nine hundred and fifty-four.

JOHN A. FEEHAN, JR.,
Clerk, U. S. Court of Appeals
for the Fifth Circuit.

JAN 27 1955

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 479

BERNARD B. KANIECHER,

Petitioner,

vs.

IRWIN OPERATING CO.,

Respondent.

REPLY BRIEF OF RESPONDENT

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 479

BERNARD B. KANISCHER,

Petitioner,

vs.

IRWIN OPERATING CO.,

Respondent.

REPLY BRIEF OF RESPONDENT

This is a petition for Writ of Certiorari to review a judgment of the Circuit Court of Appeals for the Fifth Circuit affirming a judgment of the District Court, Southern District of Florida, dismissing a suit for lack of jurisdiction brought under the Jones Act by the petitioner, Bernard B. Kanischer, a hotel cabana boy who sustained personal injuries while on a fishing trip on a boat owned and operated by a third party for personal pleasure.

SUMMARY STATEMENT

Kanischer brought suit in the District Court under the Jones Act against his employer, Irwin Operating Co.,

and one Kaplan, the owner and operator of an 18-foot speed boat JO ANN. He alleged that he sustained personal injuries as a result of the negligent operation of the boat by Kaplan and because the boat was unseaworthy.

Respondent Irwin Operating Co., answered, denying negligence and contending that Kanischer was not a seaman; was not employed as a seaman; did not sustain injuries within the course of his employment as a seaman; and denied that it owned, controlled, or operated the boat JO ANN.

At the Pre-Trial Conference it was stipulated that Kaplan owned, managed, controlled and operated the boat JO ANN, and that respondent, Irwin Operating Co., was not the operator of the boat. The case against Kaplan was transferred to the admiralty side of the Court, whereas the case against Irwin Operating Co., went to trial on the issues thus framed by pleadings.

The respondent, Irwin Operating Co., operated an ocean front hotel on Miami Beach and employed Bernard Kanischer as a cabana boy. His duties consisted of cleaning the cabanas, replacing soiled towels, supplying guests with ice, tables, score pads for card games, etc. (Tr. 166-167). He had no previous maritime experience and in fact had been out on boats on only three occasions during the three-year period he served as a cabana boy for the hotel (Tr. 127, 173-176). Kanischer was invited by Kaplan to join him on the boat JO ANN for the fishing trip, and there is some evidence that Kanischer's supervisor requested him to go with Kaplan on this trip (Tr. 107, 138-139). Whether requested to go or not, the evidence is clear that he was an avid and enthusiastic fisherman. When he

was not occupied with his duties as cabana boy, he was ofttimes seen fishing from the jetties in front of the hotel.

Kaplan took the fishing party out into the ocean and Kanischer assisted in handling the lines and the anchor, baiting hooks and sponging the deck (Tr. 135, 139-143). Kanischer also fished himself and presumably enjoyed it. At the conclusion of the trip, Kanischer was injured while attempting to anchor the boat in the shallow waters off the beach in front of the hotel.

The trial judge found no evidence to show that there was any connection between defendant Irwin Operating Co., and the operator of the boat JO ANN, and found no evidence to show that Kaplan was operating the boat as agent, servant or employee of defendant, or otherwise. As a matter of fact, the undisputed evidence shows that respondent was engaged solely in the business of operating a resort hotel on Miami Beach. It had no interest in the operation of the boat JO ANN, or any other boat. Its function was wholly non-maritime. It owned no boats, or vessels, or docks, and employed no seamen, stevedores, longshoremen, or maritime workers.

THE DECISION BELOW

At the conclusion of the plaintiff's case, respondent moved for a directed verdict, or in the alternative to dismiss the case for lack of jurisdiction. The trial judge granted the alternative motion, holding that the action could not be maintained under the Jones Act as it had not been made to appear that defendant was either the owner or the owner pro hac vice of the boat at the time of the accident. (See Appendix, page i.)

another who has no connection with the employer's business, either as servant, agent, or otherwise. There is not one bit of evidence to show that respondent was guilty of any negligent act or omission. All that was proven was that the relationship of employer-employee existed between respondent and petitioner, and that he was injured through the negligence of another while on a fishing trip. It was stipulated that the boat was owned and operated by Kaplan. The fishing trip was purely for personal pleasure and was not conducted in furtherance of any business interest of the respondent either directly or indirectly. To reverse the judgment, the Court would have to hold that (1) employment and (2) injury sustained on navigable waters are the sole requirements of liability under the Jones Act.

Among other requirements this Court has held that the employer must be the owner or owner pro hac vice of the vessel. Our opponent at pages 5 and 6 of his brief contends that the case Fink v. Shepard S. S. Co., 337 US 810, 69 S. Ct. 1330 93 L. Ed. 1709 stands for the proposition that ownership of the vessel is immaterial. This case, however, explicitly holds to the contrary. The Court stated: page 1713, Law Ed.

> "Although this case involves the right to wages and maintenance and cure, whereas McAllister and Fink concern damages for negligent injury, the reasoning and decisions in those cases are dispositive here. This is so because the right to maintenance and cure is 'annexed to the employment,' Cortes v. Baltimore Insular Line, 287 U.S. 367, 371, 77 L Ed. 368, 371, 53 S. Ct. 173, see The Osceola, 189 U.S. 158, 47 L. Ed. 760, 23 S. Ct. 483, is

'an incident of the marine employer-employee relationship.' Aguilar v. Standard Oil Co. 318 U.S. 724, 730, 87 L. Ed. 1107, 1112, 63 S. Ct. 930; 1 Benedict, Admiralty (6th Ed. 1940) 61, 253; and because *only the owner or owner pro hac vice of a vessel is liable* for wages, which also stem from the contract of employment, Shilman v. United States (C.C.A. 2d N.Y.) 164 F. 2d 649, 652; The John F. Berwind (C.C.A. 2d N.Y. 56 F. 2d 13; Everett v. United States (C.C.A. 9th Wash.) 284 F. 203; Cox v. Lykes Bros. 237 N.Y. 376, 383, 142 N.E. 226, 228, 229. Thus liability for wages and maintenance and cure depends upon the same relationship that is required to support an action for negligent injury. That relationship does not exist between petitioner and respondent."

Our opponent also contends that the holding of the lower court is in conflict with this Court's decision in Cosmoplitan Shipping Co. v. McAllister, 337 U.S. 783, 69 S. Ct. 1317, 93 L. Ed. 1692. On the contrary a mere casual reading of the opinion would demonstrate that the lower court's decision is entirely in harmony with the pronouncement of this Court in that case. In the McAllister case the court laid down a criteria for determining who was an employee within the meaning of the Jones Act. It was held to depend upon whose enterprise the operation of the vessel was. The Court stated: page 1698, Law Ed.

"We have no doubt that under the Jones Act, only one person, firm or corporation can be sued as employer.

* * * *

preme Court, in International Stevedoring Co. v. Haverty, 272 U. S. 50, 47 S. Ct. 19, 71 L. Ed. 157, held the benefits afforded a 'seaman' under the Act to be available to a longshoreman engaged in loading or unloading a vessel at dock on navigable waters. But shortly thereafter, Congress enacted the Longhoreman's and Harborworkers' Compensation Act, establishing a system whereby certain maritime workers should receive redress for their injuries from their employers in the form of compensation That Act excepts from its .operation a master or member of a crew of any vessel, section 3, and renders the employer's liability under the Act exclusive of all other liability of the employer to the employee, section 5. 'We must take it that the effect of these provisions of the Longshoremen's Act is to confine the benefits of the Jones Act to the members of the crew of a vessel plying in navigable waters and to substitute for the right of recovery recognized by the Haverty case only such rights to compensation as are given by the Longshoremen's Act,' Swanson v. Marra Bros., 328 U.S. 1, 7, 66 S. Ct. 869, 872, 90 L. Ed. 1045. (1945).

"Plaintiff alleges in his complaint that he was acting as a seaman. However, 'seaman' is a term broad enough to cover both one who is a 'member of a crew' and one who is not a 'member of a crew.' Carumbo v. Cape Cod S. S. Co., 1 Cir., 123 F. 2d 991, 994. It must be determined whether the plaintiff here was a member of the crew of the vessel whereon he was injured.

"It clearly appears that the plaintiff was hired on December 11, 1948, at 12:55 P.M. to report to work aboard the 'Mormacmoon' the next morning, for the specific purpose of assisting in the discharge of a cargo from that ship; that he entered upon such duty; and that he was subject to orders, and took orders, from the hatch foreman, the stevedore foreman of the defendant, who hired the plaintiff."

"From these facts, it must follow that the plaintiff was not a member of the crew, or a 'seaman' within the meaning of the Jones Act. *"The requirements that the ship be in navigation; that there be a more or less permanent connection with the ship; and that the worker be aboard primarily to aid in navigation appear to us to be the essential and decisive elements of the definition of a 'member of a crew'.* Carumbo v. Cape Cod S. S. Co., supra 123 F. 2nd at page 995, and cases therein cited. The plaintiff had no 'more or less permanent' connection with the ship; he was primarily aboard to perform the sort of service rendered by a stevedore. See South Chicago Co. v. Bassett, 309 U.S. 251, 60 S. Ct. 544, 84 L. Ed. 732; Maryland Casualty Co. v. Lawson, 5 Cir., 94 F. 2d 190."

The decisions of this Court have made it quite clear that there must be a more or less permanent connection with the ship and that the worker be aboard primarily in aid of navigation. The vessel JO ANN had no permanent crew and Kanischer's connection with the boat can best be described as casual.

See also LAWSON v. MARYLAND CASUALTY COMPANY, 94 F. 2d 193, wherein the Fifth Circuit Court of Appeals held that although the plaintiff was working on navigable waters of the United States in a matter relating to navigation, he was not a member of a crew. The Court said:

> "In a loose sense he was of the crew of the skiff, but we do not think a rowboat less than sixteeen feet long, capable of carrying three men, and propelled by one oar at its stern, is a vessel having a crew within the meaning of this law, in spite of the very broad definition of a vessel found in 1 U. S. C. A. § 3. *Such a boat usually has no organized personnel, no permanent company.* This boat belonged to the nearby dredge, and was certainly not an independent vessel with a separate crew. The dredge itself was probably a vessel with a crew under the authority of the case of Kidadeaux v. Standard Dredging Co., 5 Cir., 81 F. 2d 670, though the evidence concerning her is meager. But we think Rolle was not a member of her crew. He was not employed by her master, but by a labor foreman on land. He was paid by the hour, and worked only when needed. Occasionally he was called on to assist in moving heavy objects on the dredge, *but had no regular work aboard her.* His work was assigned and directed, not by the master, but by the land foreman, who stood on the nearby causeway which spans the harbor while the dynamiting was done. *Rolle did not sleep aboard the dredge, but at home on land.* He could and sometimes did get dinner on the dredge, but must pay for it. He was employed by the foreman

as a laborer, and put into a boat belonging to the dredge to do the work desired, not as a part of the dredge's activity directed by its master, but because the superintendent of Clarke Dredging Company in Miami was the master's superior and could take the dredge's skiff for such uses as he desired. Rolle was not a member of the crew of the dredge, but a laborer working under control from the land. *He was bound to no vessel as a crew member . . . . .*"

Certainly it cannot be said that Kanischer was injured in the course of his employment as a seaman, since the operation of the boat JO ANN was not in furtherance of any business of Kanischer's employer.

POINT III

THE APPEAL IS MOOT, SINCE A SETTLEMENT FOR $15,000.00 HAS BEEN CONCLUDED BETWEEN PETITIONER AND KAPLAN, THE OWNER OF THE BOAT FOR UNDER FLORIDA LAW, RELEASE OF ONE OF TWO JOINT TORT FEASORS IS A RELEASE OF BOTH.

Since the Circuit Court of Appeals handed down its decision in August of 1954, a Rule to Show Cause has been issued by the District Court, directing Kanischer to show cause why a settlement agreement made with Kaplan should not be made the judgment of the Court. The Court heard the testimony of the respective parties and made certain Findings of Fact and Conclusions of Law and on November 9, 1954, entered a Final Judgment in favor of

Kanischer and against Kaplan for the sum of Fifteen Thousand and no/100 ($15,000.00) Dollars, and held that the settlement agreement between the parties be made the judgment of the Court. Kaplan thereupon paid $15,000.00 into the Registry of the Court pursuant to said judgment, and an order was entered on November 10, 1954 by the District Judge, authorizing said funds to be paid over to Kanischer's attorneys. Certified copies of these papers have been filed with this Court and same are set forth in the Appendix. See Appendix, pages iii - vii.

It is quite clear under Florida Law that a release or discharge of one or more joint tort feasors is a discharge of all, since the party injured cannot have but one satisfaction for his injuries, and each tort feasor is considered as sanctioning all acts of the others thereby making them his own. Each is liable for the whole damage as if it had been occasioned by him alone and hence the Law considers that he who pays for the injury has paid for all and there is nothing left for which the other tort feasor can be liable. Roper v. Florida Public Utilities Co., 179 So. 904, 131 Fla. 709; Davidow v. Seyfarth, 58 So. 2d 865, — Fla. —; Martin v. Burney, 34 So. 2d 36, 160 Fla. 183; Louisville & N. R. Co. v. Allen, 65 So. 8, 67 Fla. 257; L. R. A. 1915C, 20; Feinstone v. Allison Hospital, 143 So. 251, 106 Fla. 302.

It is abundantly clear that since the Circuit Court of Appeals has rendered its decision, the plaintiff has received full payment and satisfaction for his injuries and both parties are thereupon released. This appeal is, therefore, moot.

CONCLUSION

We think it is quite clear that no novel or unusual question of law is presented by this Petition for Certiorari. The legal requisites for a "master" or a "member of a crew" have been well defined and limited by the decisions of this Court, nor is there anything difficult about applying the law to the facts of this case. It would be ridiculous to hold the operator of a hotel liable under the Jones Act for negligent injuries inflicted on its employee by a third person who has no connection with the hotel or its operation, either directly or indirectly. We respectfully submit that the Petition for Certiorari should be denied.

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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION. No. 3926-M-Civil.

BERNARD B. KANISCHER, Plaintiff,

vs

JOSEPH KAPLAN, CADILLAC HOLDING CORP., a Florida corporation, IRWIN OPERATING CO., a Florida corporation jointly and severally, Defendants.

OPINION AND ORDER OF DISMISSAL FOR LACK OF JURISDICTION

This cause came on for trial before the undersigned Judge and a Jury. At the conclusion of plaintiff's case, the defendant IRWIN OPERATING CO. moved the Court to direct a verdict in favor of the defendant, or, in the alternative, to dismiss the cause for lack of jurisdiction.

This is an action under the Jones Act, 46 USCA Sections 688 et seq., brought by an employee against his employer, contending that he was injured while on a fishing trip aboard the boat JO ANN, due to the negligence of one JOSEPH KAPLAN, who was the sole owner and in possession and control of the boat at the time of the accident. There is no evidence to show that there was any connection between the defendant IRWIN OPERATING CO. and the operation of the boat JO ANN or that KAPLAN was oper-

ating the same as the agent, servant or employee of this defendant or otherwise. It follows, therefore, that this action cannot be maintained under the Jones Act, as it has not been made to appear that the defendant was either the owner or the owner pro hac vice of the boat at the time of the accident, FINK v. SHEPARD STEAMSHIP COMPANY, 69 S. Ct. 1330, 33 US 810, 93 L. Ed 1709; COSMOPOLITAN SHIPPING COMPANY v. McALLISTER, 69 S. Ct. 1317, 337 US 783, 93 L. Ed 1692; GERRADIN v. UNITED FRUIT COMPANY, 60 Fed. (2d) 927. It is unnecessary to rule on the other grounds assigned in support of the motion.

Accordingly, it is ORDERED AND ADJUDGED that this action be and the same is hereby dismissed as to the defendant IRWIN OPERATING CO., for lack of jurisdiction, and said defendant go hence without day, together with its costs to be taxed by this Court.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida, on this the 1st day of February, A. D., 1954.

/s/ C. C. Wyche
United States District Judge
Sitting by Designation

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF FLORIDA.
MIAMI DIVISION

FILED Miami Fla Nov 8 1954 JULIAN A. BLAKE, CLERK No. 3926-M-Civil

BERNARD B. KANISCHER, Plaintiff,

vs

JOSEPH KAPLAN, Defendant

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT:

1. The Court has jurisdiction of the parties and the subject matter.

2. The settlement of plaintiff's case against Kaplan at $15,000.00 was agreed to by plaintiff's counsel and defendant's counsel.

3. The settlement mentioned in Finding No. 2 above was agreed to by plaintiff himself.

4. The settlement was not only agreed to by plaintiff's counsel and plaintiff himself, but was acted upon by plaintiff's counsel in the private interviewing of the defendant Kaplan with reference to the plaintiff possibly using Kaplan as a witness in the prosecution of the case against the codefendant then currently being tried.

CONCLUSIONS OF LAW:

1. The relief prayed by the Petitioner Kaplan should be granted, and petitioner's counsel should submit a judgment in favor of plaintiff for the agreed amount as requested, to-wit: $15,000.00.

Dated at Miami, Florida, this 8th day of November, 1954.

/s/ John W. Holland
Chief Judge

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA. MIAMI DIVISION. No. 3926-M-Civil

Filed Miami, Fla., Nov. 9, 1954. JULIAN A. BLAKE, Clerk.

BERNARD B. KANISCHER, Plaintiff,

vs

JOSEPH KAPLAN, Defendant.

FINAL JUDGMENT

This cause coming on to be heard upon the petition of the defendant, JOSEPH KAPLAN, for a rule to show cause and upon the rule to show cause entered thereon on October 4th, 1954, and the Court having heard testimony of the respective parties and being fully advised in the premises and having made Findings of Fact and Conclusions of Law, which are hereby referred to and incorporated herein, it is

ORDERED, CONSIDERED AND ADJUDGED that the said settlement agreement between the plaintiff and the defendant be, and the same is hereby, made the judgment of this Court.

It is FURTHER ORDERED, CONSIDERED AND ADJUDGED that the plaintiff, BERNARD B. KANISCHER, do have and recover of the defendant, JOSEPH KAPLAN, the sum of Fifteen Thousand Dollars ($15,000.00).

It is FURTHER ORDERED, CONSIDERED AND ADJUDGED that if the said JOSEPH KAPLAN, shall pay the sum of Fifteen Thousand Dollars ($15,000.00) into the Registry of this Court, the Clerk of this Court is authorized and directed to receive same and note on the margin of the record this fact, and to issue no execution thereon, and thereafter that the defendant, KAPLAN, go hence without day.

JWH

DONE AND ORDERED at Miami, Dade County, Florida, this 9th day of November, 1954.

/s/ John W. Holland
District Judge

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA.
No. 3926-M-Civil

Filed Nov. 10, 1954

BERNARD B. KANISCHER, Plaintiff,

vs

JOSEPH KAPLAN, Defendant.

ORDER

THIS CAUSE BEING BEFORE ME, upon petition of the Plaintiff, and the Court being fully advised in the premises, it is hereupon

ADJUDGED AND ORDERED

THAT the Clerk of this Court turn over to the law firm of VON ZAMFT & KRAVITZ, 1512 Security Building, Miami, Florida, such funds as have been deposited in the Registry of this Court by the defendant, JOSEPH KAPLAN, in this cause, in the sum of $15,000.00.

Done and ordered in Chambers, this 10th day of November, A. D. 1954, at Miami, Florida.

/s/ John W. Holland
Chief Judge

FILED
FEB 12 1955
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

October Term, 1954
No. 479

BERNARD B. KANISCHER,
Petitioner,

vs

IRWIN OPERATING CO.,
Respondent.

PETITIONER'S ANSWER TO RESPONDENT'S REPLY BRIEF

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Supreme Court of the United States

October Term, 1954

No. 479

BERNARD B. KANISCHER,
Petitioner,

vs

IRWIN OPERATING CO.,
Respondent.

PETITIONER'S ANSWER TO RESPONDENT'S REPLY BRIEF

Respondent's Reply Brief seems to indicate an erroneous concept; that ownership or ownership *pro hac vice* is an essential prerequisite to the institution of a Jones Act cause.

The Court below appears to have adopted this view.

We believe that there is no justification for such interpretation. Nothing in the Jones Act provides for such prerequisite.

It would appear that the right to maintain an action pursuant to the provisions of the Jones Act is the relationship of employer-employee in maritime service. *Cosmopolitan Shipping Co.* v. *McAllister*, 337 U. S. 783, 69 S. Ct. 1317.

Respondent concedes that the relationship of employer-employee existed and that Kanischer was injured through the negligence of the master of the craft involved.

Respondent's charge that it would be a "monstrous proposition" to invoke the provisions of the Jones Act herein overlooks the conclusion that traditionally our form of government is based on the concept that trial by the jury is the best known safeguard of justice.

We humbly submit that the question as to whether or not a man is a seaman engaged in seaman's duties and injured through the negligence of a fellow seaman can safely be left to the decision of twelve American citizens. The taking of such function from a jury on to himself by a trial judge constitutes error.[1]

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[1] This Court held in the case of *Bailey* v. *Central Vermont Ry., Inc.*, 319 U. S. 350, 63 S. Ct. 1062, at page 354, as follows:

> "The right to trial by jury is 'a basic and fundamental feature of our system of federal jurisprudence.' Jacob v. New York City, 315 U. S. 752, 65 S. Ct. 854, 86 L. Ed. 1166. It is part and parcel of the remedy afforded railroad workers under the Employers' Liability Act. Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries. That method of determining the liability of the carriers and of placing on them the cost of these industrial accidents may be crude, archaic, and expensive as compared with the more modern systems of workmen's compensation. But however inefficient and backward it may be, it is the system which Congress has provided. To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

The Jones Act is an adaptation of the Federal Employers' Liability Act to seamen.

In the case of *Johnson* v. *Dierks Lumber & Coal Co.*, 130 F. (2d) 115, the Court stated on page 119:

> "Moreover, where reasonable men may draw different inferences from the evidence, it is the province of the jury to determine which is proper."

The Seventh Amendment to the Constitution guarantees to all litigants the right of trial by jury.

The Supreme Court has repeatedly held that the issue of negligence is the function of the jury.

Mr. Justice Miller declared,

> "We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others." *Jones* v. *East Tennessee, V. & G. R. Co.*, 128 U. S. 443, 445, 9 S. Ct. 118, 32 L. Ed. 478 (1888).

See also:

Jacob v. *City of New York*, 315 U. S. 752, 62 S. Ct. 854, 86 L. Ed. 1166 (1942);
Wolf v. *Chicago, M. St. P. & Pac. R. Co.*, 180 Minn. 310, 230 N. W. 826 (1930);
Chesapeake & Ohio R. Co. v. *Winder*, 23 F. (2d) 794, (C. C. A. 4, 1928);
Wilson v. *Director General of Railroads*, 95 N. J. L. 482, 112 A. 732 (1921), certiorari denied 256 U. S. 700, 41 S. Ct. 538, 65 L. Ed. 1178 (1921);
Norfolk & W. R. Co. v. *Earnest*, 229 U. S. 114, 33 S. Ct. 654, 57 L. Ed. 1096 (1913);
Dutton v. *Atlantic Coast Line R. Co.*, 104 S. C. 16, 88 S. E. 263 (1916), affirmed 245 U. S. 637, 38 S. Ct. 191, 62 L. Ed. 525 (1918);
Union Pac. R. Co. v. *Hadley*, 246 U. S. 330, 38 S. Ct. 318, 62 L. Ed. 751 (1918).

The weight of the evidence and the credibility of the witnesses must be left to the jury. *Shiffler* v. *P. R. R.*, 176 F. (2d) 368 (C. A. 3, 1949); *Railway Mail Ass'n* v. *Chamberlain*, 148 F. (2d) 206 (C. C. A. 8, 1945). The jury must pass upon the entire complex of negligence, contributory negligence and the fair apportionment of damages. *Buchanan* v. *Chicago & N. W. Ry. Co.*, 159 F. 2d 576 (C. C. A. 7, 1947); *Hadley* v. *Baltimore & O. R. Co.*, 120 F. (2d) 993 (C. C. A. 3, 1941).

In recent cases, the Supreme Court has reiterated the importance of preserving the right of trial by jury. *Wilkerson* v. *McCarthy*, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497 (1949). In fact, where a state supreme court reversed a jury verdict on the grounds that there was no evidence of negligence, the United States Supreme Court held that the issue of negligence must go to the jury. *Lavender* v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916 (1946).

Where there is conflicting evidence, it is for the jury to decide which facts to believe. *Jesionowski* v. *Boston & Me. R. Co.*, 329 U. S. 452, 67 S. Ct. 401, 91 L. Ed. 416 (1947).

All of these questions of fact, whether they deal with negligence, contributory negligence, scope of employment, causation or damages, should be approached in the light of the language found in *Jamison* v. *Encarnacion*, 281 U. S. 635, 50 S. Ct. 440, 442, 74 L. Ed. 1082 [1930], where Mr. Justice Butler declared:

> "The act is not to be narrowed by refined reasoning or for the sake of giving 'negligence' a technically restricted meaning.

It is to be construed liberally to fulfill the purposes for which it was enacted, and to that end the word may be read to include all the meanings given to it by courts, and within the word as ordinarily used."

In view of the holding of *Pope & Talbot* v. *Hawn*, 346 U. S. 406, 74 S. Ct. 202, we submit that the following are authoritative:

Remedies of Merchant Seaman Injured on Government Owned Vessels, 55 Yale Law Journal, 584, 591;
Cases collected in Note (1943) 10 University of Chicago Law Review, 339;
Palfrey, The Common Law Courts and the Law of the Sea (1923);
36 Harvard Law Review, 777-785-6;
Garrett v. *Moore McCormack Lines, Inc.*, 317 U. S. 239, 63 S. Ct. 246;
Lindgren v. *United States*, 281 U. S. 38, 50 S. Ct. 207;
Curtis Bay Towing Co. v. *Dean*, 174 Md. 498, 199 A. 521;
Cosmopolitan Shipping Co. v. *McAllister*, 337 U. S. 783, 69 S. Ct. 1317;
The Lottawanna, 21 Wall 558, 22 L. Ed. 654;
Southern Pacific Co. v. *Jensen*, 244 U. S. 205, 37 S. Ct. 524;
Lavender v. *Kurn, supra;*
Wilkerson v. *McCarthy, supra;*
Tennant v. *Peoria & P. U. R. Co.*, 321 U. S. 29, 64 S. Ct. 409;
Myers v. *Reading Co.*, 331 U. S. 477, 67 S. Ct. 1334;
Rodd v. *Heartt*, 17 Wall. 354, 21 L. Ed. 627;
Stubbs v. *The City of Rochester*, 226 N. Y. 516.

The law is clear that on a motion to direct a verdict for the defendant every fact in evidence and every reasonable inference therefrom in favor of the plaintiff is admitted by the defendant.

Hellweg v. *Telephone Co.*, 110 F. (2d) 546 (C. A. D. C., 1940);
McKinney v. *Public Service*, 4 N. J. 229 (1950);
Sokol v. *Liebstein*, 9 N. J. 93, 98 (1952).

In the case of *Howard* v. *Louisiana & A. Ry. Co.*, 49 F. (2d) 571 (C. C. A. 5th, 1931), the Court stated on page 574:

"This state of the evidence requires that the issues of fact raised upon conflicting testimony 'shall be settled by a jury,

and that the court shall not assume, directly or indirectly, to take from the jury or to itself such prerogative'."

In the case of *Baltimore & Ohio R. R. Co.* v. *Groeger*, 266 U. S. 521 (1924), the Court stated on page 524:

> "The credibility of witnesses, the weight and probative value of evidence, are to be determined by the jury and not by the judge."

As early as 1830, in the case *Parsons* v. *Bedford*, 3 Pet. 433, 1830, 28 U. S. 433, the Court laid down a principle of law which has consistently been followed by all the Courts of this country, and which principle was reiterated in the case of *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364, wherein the Court stated on page 378 as follows:

> "The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy."

Said Court further stated, on page 378, quoting from the case of *Walker* v. *New Mexico & c. Railroad Co.*, 165 U. S. 593:

> "This requires that questions of fact in common law actions shall be settled by a jury, and that the court shall not assume directly or indirectly to take from the jury or to itself such prerogative."

The Court in *Fratta* v. *Grace Line*, 139 F. (2d) 743, 744 (C. C. A. 2nd, 1943) stated as follows:

> "We take this occasion to suggest to trial judges that, generally speaking—although there may be exceptions—it is desirable not to direct a verdict at the close of the evidence, but to reserve decision on any motion therefor and allow the jury to bring in a verdict; the trial judge may then, if he thinks it improper, set aside the verdict as against the weight of the evidence and grant the motion, Federal Rules of Civil Procedure, rule 50 (b), 28 U. S. C. A. following section 723c, with the consequence that if, on appeal, we disagree with him, we will be in a position to reinstate the verdict, thus avoiding the waste and expense of another trial. Reversed."

Respondent takes issue with the interpretation by petitioner of the decisions in the cases of *Fink* v. *Shepard S. S. Co.*, 337 U. S. 810, 69 S. Ct. 1330 and *Cosmopolitan Shipping Co.* v. *McAllister, supra.*

It would appear that there is an honest difference of opinion as to the meaning to be given to the holdings in said cases, which would merit further comment by this Court as to the true intent of said holdings.

The difference of opinion would necessarily be colored by the particular interest of the persons involved. The oft expressed desirability of having a uniform admiralty practice would be greatly fostered by a clarification of this confused concept.

Respondent's Point II clearly establishes the presence of a factual issue, the decision of which was taken from the jury onto himself by the trial judge. We submit that this was error.[2]

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[2] As late as January 31, 1949, in the case of *Wilkerson* v. *McCarthy, supra*:

> "Moreover, this Court stated some sixty years ago when considering the proper tribunal for determining questions of negligence; 'We see no reason, so long as the jury system is the law of the land and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.' Jones v. East Tennessee, V. & G. R. Co., 128 U. S. 443, 445, 32 L. ed. 478, 480, 9 S. Ct. 118. And peremptory instructions should not be given in negligence cases 'where the facts are in dispute, and the evidence in relation to them is that from which fairminded men may draw different inferences.' Washington & G. R. Co. v. McDade, 135 U. S. 554, 572, 34 L. ed. 235, 241, 10 S. Ct. 1044. Such has ever since been the established rule for trial and appellate courts. See Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 67, 68, 87 L. ed. 610, 617, 618, 63 S. Ct. 444, 143 A. L. R. 967. Courts should not assume that in determining these questions of negligence juries will fall short of a fair performance of their constitutional function. In rejecting a contention that juries

The controversy presented herein is clear cut. Petitioner pleads that the question of whether or not a man is a seaman entitled to maintain an action under the Jones Act is an issue that should be submitted to a jury as a matter of fact. Respondent urges that it is "monstrous" and should be disposed of as a matter of law.

Petitioner's prayer is for this Court to consider this question.

Any further comment would be mere repetition.

Respondent cites cases [3] which would indicate that only crew members permanently associated with the vessel are entitled to the benefits of the Jones Act. We submit that the benefits granted by Congress to victims of maritime torts applies to seamen irrespective of whether they be permanently or temporarily employed by the ship as pointed out in our main brief.

Scope of employment again is a factual question and not one of law. *Jamison* v. *Encarnacion*, 281 U. S. 635, 50 S. Ct. 440.

Point III of respondent's brief urges state law as a bar to a federal right. Such argument is not persuasive as similar argument has been disposed of by this Court as having no merit in the recent case of *Cox* v. *Roth*, 75 S. Ct. 242.

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could be expected to determine certain disputed questions on whim, this Court, speaking through Mr. Justice Holmes, said: 'But it must be assumed that the constitutional tribunal does its duty and finds facts only because they are proved.' Aikens v. Wisconsin, 195 U. S. 194, 206, 49 L. ed. 154, 160 25 S. Ct. 3." See also cases cited in footnote 1.

[3] *Rackus* v. *Moore McCormack Lines, Inc.*, 85 F. Supp. 185; *Swanson* v. *Marra Bros.*, 328 U. S. 1, 66 S. Ct. 869; *Lawson* v. *Maryland Casualty Company*, 94 F. (2d) 193.

Wherefore, for the reasons set forth above, we respectfully submit that this Court should issue its Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit in this cause.

Respectfully submitted,

Jacob Rassner,
Attorney for Petitioner.

MAR 1 1955
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

October Term, 1954

No. 479

BERNARD B. KANISCHER,

Petitioner,

against

IRWIN OPERATING CO.,

Respondent.

PETITION FOR REARGUMENT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JACOB RASSNER,
Attorney for Petitioner.

SUPREME PRINTING CO., INC., 114 WORTH STREET, N. Y. 13, BEEKMAN 3-2320
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Supreme Court of the United States

October Term, 1954

No. 479

BERNARD B. KANISCHER,

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against

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Respondent.

PETITION FOR REARGUMENT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Bernard B. Kanischer petitions this Honorable Court and respectfully requests a rehearing of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, which petition for said writ was denied by this Court on the 14th day of February, 1955.

The Reason for Petition for Reargument

Petitioner urged that a writ of certiorari be granted to the court below, which petition was based upon Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, Reply Brief of Respondent and Petitioner's Answer to Reply Brief.

POINT I

Upon receipt of Reply Brief of Respondent, petitioner prepared an Answer to Respondent's Reply Brief.

Said answer, after service on respondent was filed by mail in the office of the Clerk of this Court on the 12th day of February, 1955.

The denial of the petition was handed down on the morning of the 14th day of February, 1955.

It would appear possible that Petitioner's Answer to Respondent's Reply Brief was received too late for consideration by this Honorable Court in its decision with respect to said ~~decision~~ petition for writ of certiorari.

Said answer was an integral part of petitioner's request for relief by this Court.

Conclusion

Petitioner respectfully requests reargument of the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit as based upon Petitioner's Answer to Respondent's Reply Brief.

JACOB RASSNER,
Attorney for Petitioner.

Certificate

I hereby certify that I am the attorney for the plaintiff-appellant-petitioner in the above entitled case; that the foregoing Petition for Rehearing is filed in good faith, upon a real and substantial ground and not for the purpose of delay.

Dated: New York, New York,
February 28, 1955.

JACOB RASSNER.